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Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

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Committee against Torture

Decision adopted by the Committee under article 22 of the Convention, concerning communication No. 702/2015*, **

Communication submitted by:	S.S. and P.S. (represented by counsel, Rajwinder S. Bhambi)
Alleged victim:	The complainants
State party:	Canada
Date of complaint:	4 October 2015 (initial submission)
Date of adoption of decision:	14 November 2017
Subject matter:	Deportation to India
Substantive issue:	Non-refoulement
Procedural issues:	Admissibility — exhaustion of domestic remedies; manifestly unfounded
Articles of the Convention:	3 and 22

1.1 The complainants are S.S., born in 1974, and P.S. born in 1993, a father and son, both nationals of India residing in Canada. The State party ratified the Convention and made a declaration under article 22 in 1987 and 1989, respectively. The complainants are represented by counsel, Rajwinder S. Bhambi.

1.2 The complainants are subject to deportation to India following the rejection of their application for refugee status in Canada. The deportation was scheduled for 7 October 2015. The complainants assert that their rights under article 3 of the Convention will be violated if Canada proceeds with their forcible deportation.

1.3 On 7 October 2015, the Committee, acting through its Rapporteur on new complaints and interim measures, decided to issue a request for interim measures under rule 114, paragraph 1, of the Committee's rules of procedure and requested the State party to refrain from deporting the complainants to India while their communication was being considered by the Committee. The State party requested that interim measures be lifted in December 2015 and again in April 2016. The Committee denied the requests of the State party to lift the interim measures.

* Adopted by the Committee at its sixty-second session (6 November–6 December 2017).

** The following members of the Committee took part in the examination of the communication: Essadia Belmir, Alessio Bruni, Felice Gaer, Abdelwahab Hani, Claude Heller Rouassant, Jens Modvig, Sapana Pradhan-Malla, Ana Racu, Sébastien Touzé and Kening Zhang.

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The facts as presented by the complainants

2.1 S.S. (the first complainant) was born on 3 July 1974 in Punjab, India. He married in March 1992 and the couple had two children: P.S. (the second complainant), born on 10 January 1993 in Punjab, and a daughter, Sukhneet Kaur.[1] The complainants are both Sikh. In their village, the Sikh temple is very close to their home and during the militancy in Punjab,[2] their area suffered raids and police brutality, as some Sikh terrorists originated from that area.[3]

2.2 S.S. made his living farming and also worked in Dubai as a truck driver. During his time in Dubai, he met another Sikh, Gurmukh Singh, who was also on a work visa there. Gurmukh was an "amritdhari"[4] Sikh, and had a good knowledge of Sikhism. He told the complainant that he had been a priest in Punjab.[5] The two men became friends, and the complainant helped Gurmukh Singh obtain work as a priest in the Sikh temple in Dubai. In October 2009, the first complainant's contract in Dubai ended and he went back to India. He was the secretary of the Sikh temple in his village, Gurdawara. In September 2010, Gurmukh Singh went to India as his work permit in Dubai had not been renewed. The complainant appointed him as a priest in the village temple.

2.3 On 24 December 2010, the police raided the village looking for Gurmukh Singh, who managed to escape. They arrested the first complainant. He was taken to the police station, questioned about Gurmukh Singh's whereabouts and tortured. He was slapped, punched and kicked until he fainted; he was hung upside down from the ceiling by a rope; his thighs were rolled over with a roller; he was beaten on his buttocks with leather belts; he was beaten on the soles of his feet and his legs were pulled apart; and he was kicked in the genitals. The complainant also claims that a police officer struck his abdomen with an iron bar and that the resulting wound became infected and had to be operated on. He also states that he had many external and internal wounds as a result of his torture. During his detention, the police falsely alleged that Gurmukh Singh was a terrorist who had gone to Dubai to train and had come back to recruit new militants. They claimed that the complainant was acting with him and that they had travelled from Pakistan to Dubai to meet Sikh militants there. The village committee and village council helped the complainant's family and the police were bribed to secure his release. He was released on 27 December 2010 on the condition that he report to the police any information regarding Gurmukh Singh's whereabouts. The complainant states that he was taken by ambulance to Satnam hospital in Nurmahal on the same day for treatment of the injuries resulting from the torture.[6] He states that he was treated for severe body pain, contusions, bruising, swelling, tenderness on the soles of the feet, lash marks, depression and other internal and external injuries.[7]

2.4 The complainant claims that after that day, his home and the temple were raided regularly and he was regularly questioned about Gurmukh Singh and other militants' whereabouts. He bribed the police to be left alone, but they continued to harass him. On 4 May 2011, the police arrested the complainant, again accusing him of hiding militants in the temple. The complainant claims that he was asked about Gurmukh Singh's whereabouts and that he was tortured again. He also claims that the police took photographs of him, took his fingerprints and forced him to sign blank documents. He was released on 8 May. He was then taken to the hospital, where he was treated for the same injuries as previously.[8] Once released, the complainant learned that two volunteers in the temple had also been arrested and that the police were questioning several people, including members of the

[1] About whom no further information is provided.

[2] Dates are not provided.

[3] The complainant gives as an example the name of a known Sikh terrorist, "Kulbeera Barapindiya".

[4] A Sikh who has made certain baptismal vows.

[5] No further information is given.

[6] The complainant provides a letter with Satnam hospital letterhead which states that he was treated on both this and a later date, and which confirms the reported injuries. See page 91 of the original submission.

[7] Further details of additional internal and external injuries are not provided.

[8] The complainant provides a medical certificate dated 19 December 2012 covering this and the previous incident. See page 91 of the initial submission.

village council. He then decided to leave, and went to another village to stay with relatives. While he was away the police continued to harass his family.

2.5 On 12 July 2011, the police raided his home again and, as they did not find the complainant, they arrested his son (the second complainant). He was taken to the police station, where he was questioned about his father's and Gurmukh Singh's whereabouts and tortured. He was slapped, punched and kicked; hung upside down from the ceiling by a rope; his thighs were rolled over with a roller; he was beaten on his buttocks with leather belts; he was stripped naked and plunged into water; he was kicked in the genitals; and he was forced to drink his own urine. He also claims that one of his toenails was pulled out with pliers. Under the pressure of torture, he revealed his father's whereabouts. The police raided the village where the first complainant was hiding (Shahpur), but he managed to escape. On 13 July, the second complainant was released after paying a bribe and after the village council guaranteed that the father would present himself to the police. The second complainant also claims that the police took his photograph and fingerprints and forced him to sign blank documents. After medical treatment for his injuries,[9] the complainants decided to leave the country.

2.6 On 3 November 2011, the complainants arrived in Canada on visitor visas.[10] On 1 August 2013, the Refugee Protection Division of the Immigration Refugee Board denied the complainants' asylum claims. On 3 December, the Federal Court rejected the complainants' application for leave for judicial review of the Division's decision. On 28 July 2015, the complainants' pre-removal risk assessment was denied by the immigration authorities. They considered that the complainants did not fit the profile of persons for whom police would search nationwide; therefore, the complainants did not demonstrate a subjective risk of persecution if deported to India. On 18 September, the complainants applied for leave to seek judicial review of the pre-removal risk assessment and for a stay of removal pending the determination of the leave application. Stay of removal was declined after a hearing on 24 September by the Federal Court of Canada.[11] An application for permanent resident status on humanitarian and compassionate grounds was denied on 10 November. A further application for permanent resident status on humanitarian and compassionate grounds was filed on 7 December.[12]

2.7 The complainants claim that after they left their country, the police continued to harass the wife and daughter, accusing the complainants of financing Sikh militants from abroad. Therefore, the wife and daughter decided to leave the village of Gurdawara and went to live with the wife's brother, Avtar Singh, in another village, Johal Bolina. In September 2015, after the complainants' claim was rejected on the basis of the pre-removal risk assessment, they asked their family to go to Gurdawara to see what the situation was. On 10 September, the wife and her brother went to Gurdawara. While they were at the complainants' home, the police arrived and arrested Avtar Singh. The complainants claim that the police had been informed about their presence at the family's house. Avtar Singh was tortured by the police. He suffered several severe head injuries, including a fractured skull and a broken leg, and he had several bruises on the chest and lower back.[13] He was released on 15 September, after a bribe was paid by the village council. The complainants claim that Avtar Singh passed away on 24 September[14] as a result of the injuries he suffered from the torture by the police.[15]

2.8 The complainants state that the reason that they did not return to India is that they are still being sought by police in Punjab, who were waiting at the airport on their

[9] The second complainant provides a medical note dated 19 December 2012 confirming that he received treatment from 13 to 19 July 2011 for pain, contusions, bruises and swelling all over the body and especially the legs, buttocks and soles of the feet.

[10] Valid until 13 April 2012.

[11] The complainants had legal representation for the hearing.

[12] The outcome is not known. The complainants say this can take four years.

[13] The complainants provide a medical note dated 16 September 2015 confirming his stay in hospital as a result of these injuries.

[14] The death certificate and translation were provided. The cause of death does not appear. See page 95 of the original submission.

[15] A signed statement by Avtar Singh is attached which describes the above events.

prescribed return date.[16] They claim that they have been told by village authorities that the situation in the village has been very tense since the murder of Avtar Singh and that there is an undercover police informer presence. Police have threatened to kill the complainants if they are arrested.[17]

2.9 The complainants provide various reports describing abuses by police and security forces in India, including extrajudicial killings, torture and rape,[18] attacks against religious minorities[19] and impunity in the face of extrajudicial killings.[20]

The complaint

3.1 The complainants submit that if they are returned to India, they will face a real risk of arrest, torture or ill-treatment, and even death, by the Indian police, based on the threats and attacks they suffered in the past for suspected links with Sikh militants. The complainants further allege that failed asylum seekers are at great risk of being subjected to torture if returned to India. Therefore, Canada would violate article 3 of the Convention, in particular the non-refoulement obligation, in deporting them to India. The complainants further claim that they face a risk that the authorities will fabricate a case against them under the antiterrorist legislation, which can result in the death penalty or life imprisonment.

3.2 The complainants claim that they have exhausted all available domestic remedies and that Canadian authorities have failed to properly consider their claims.

State party's observations on admissibility and the merits

4.1 On 5 April 2016, the State party submitted its observations on admissibility and the merits of the complainants' claims. It submits that the complainants' communication should be declared inadmissible on two grounds. Firstly, the authors failed to exhaust domestic remedies, as they did not pursue their application for leave to have the pre-removal risk assessment judicially reviewed, nor have they done so in relation to their application for permanent resident status based on humanitarian and compassionate grounds. They also failed to request an administrative deferral of removal, which is available where new evidence exists, as the complainants claim in this case. Secondly, the State party submits that the complainants' claim that their return to India would violate the State party's non-refoulement obligations under article 3 is manifestly unfounded, as they have failed to demonstrate prima facie that they would face a real and personal risk of torture in India.

4.2 In relation to claims by the complainants that when they learned of the death of Avtar Singh they became afraid and decided not to appear for their scheduled removal, the State party submits that they failed to inform the Canadian Border Services Agency enforcement officer of this on 18 September 2015, when they informed him that they had sold their assets and were ready to leave Canada. They did not tell him that Avtar Singh had been arrested at their house or that he had been taken to the police station for questioning about their whereabouts and tortured. They gave the officer details about the buyer of their assets; however, when contacted, the alleged buyer denied having bought anything from the complainants. Nor did the complainants inform officials of either the Agency or Canadian Immigration and Citizenship, when they did not appear for their scheduled removal, that they were afraid to return to India because of Avtar Singh's death. Instead, their counsel claimed that they had been tricked into paying for erroneous advice and had believed that the removal had been cancelled and they therefore did not have to go to the airport.

4.3 The State party asserts that competent and impartial domestic decision makers have thoroughly considered the complainants' allegations of risk in India and found no credible evidence to support those allegations. The complainants' claims for protection were made under sections 96 and 97 of the Immigration and Refugee Protection Act on the basis of

[16] No further information is provided.

[17] The complainants provide a number of affidavits corroborating their accounts.

[18] United States of America, Department of State, Country Report on Human Rights Practices in India, 2013.

[19] United States Department of State, International Religious Freedom Report for 2013.

[20] A 2009 report of the Special Rapporteur on extrajudicial, summary or arbitrary executions.

religion, membership of a particular social group and imputed political opinion. These claims were heard by the Refugee Protection Division of the Immigration and Refugee Board of Canada. At the hearing, complainants were represented by counsel, had an interpreter and had the opportunity to present their claims orally. The Division determines not only if a claimant falls within the definition of a refugee under the 1951 Convention relating to the Status of Refugees, but also whether he or she is a person in need of protection under section 97 of the Act, which mandates protection of persons facing a real risk of torture within the meaning of article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Such persons have a right not to be removed from Canada.

4.4 By decision of 1 August 2013 the Refugee Protection Division concluded that the complainants' allegations of risk upon return to India were not credible and that, in any event, they would have an internal flight alternative in India. It determined that it did not believe the central allegation that police continued to search for the complainants after they left India; they had concerns about the allegations of torture but gave the benefit of the doubt, and accepted that the complainants had had problems with local police in 2010 and 2011; however, the complainants lacked credibility regarding some of their allegations, particularly as they had testified that they had sent their identity cards to the local police while in Canada to establish their whereabouts, while also having claimed that they were in hiding. The Division concluded that they did not fit the profile of persons likely to be sought by the police in Punjab or who were important enough to attract the attention of the central authorities in India.[21] The authors also testified that they had been able to go through airport security using their own passports and that there were no arrest warrants or legal proceedings in relation to them. Therefore, the Division found that there was no evidence that they were being sought by Indian authorities or that Indian authorities would wish to search for them throughout India. The fact that they left with, and would be returning with, valid travel documents was determined to mean that their failed refugee status would not pose problems for them upon re-entry.

4.5 In addition, it was found that they would have a viable internal flight alternative to either Mumbai or New Delhi if they were in fact of interest to local police in Punjab, as available documentary evidence indicates that there is freedom of movement in India, people do not have to register their religion and local police do not have the resources to verify the identity of all new arrivals. The second complainant confirmed that he would be able to find work in a major city, and there was no evidence before the Division that the first complainant would be unable to live in one of those cities.

4.6 On 3 September 2013, the complainants applied to the Federal Court for leave to seek judicial review of the Division's decision. The authors were represented by counsel for the appeal. The burden of proof to be met is that there must be a fairly arguable case or a serious question to be determined. The application was denied on 3 December.

4.7 On 21 November 2014 the complainants applied for a pre-removal risk assessment. The scheme is based on the State party's domestic and international commitments to non-refoulement. Such applications are considered by senior immigration officers. When applicants have already had their claim determined by the Refugee Protection Division, such assessments are largely based on new facts or evidence which have arisen since the Division's decision, or which were not reasonably available, or that the applicant could not reasonably be expected in the circumstances to provide at that time and which demonstrate that the applicant is now at risk of persecution, torture or cruel or unusual punishment, or that his or her life is at risk. The affidavits provided to support the application, sworn in February 2014, were given very little probative value as they repeated the same points claimed by the authors before the Division and gave no new information. The assessment officer thoroughly reviewed objective country reports and noted the general human rights issues in India. However, the officer found that the authors had not provided evidence to demonstrate that they would be personally at risk as a result of those issues. The officer also found that the complainants had not demonstrated that they could not reasonably relocate to the viable internal flight alternatives identified by the Division, namely Mumbai or New

[21] The complainants testified that they had never been involved in politics or engaged in militant activity.

Delhi. Finally, the officer concluded that the complainants' profiles did not fit the category of persons who would be of interest to central Indian authorities, and thus concluded that they would not be at risk upon return to India.

4.8 On 29 May 2015, the complainants applied for permanent residence from within Canada on humanitarian and compassionate grounds. The purpose of this remedy is to offer equitable relief where the applicant would suffer unusual and undeserved or disproportionate hardship if he or she were forced to apply for permanent resident status from outside the State party, which would be the normal avenue. What warrants relief varies ad hoc, but examples of hardship include adverse country conditions that have a direct, negative impact on the applicant. The complainants argued that they would suffer hardship as they were established in Canada and because of the risk they faced in India, reiterating the allegations made to the Refugee Protection Division. The application was denied on 10 November on the grounds that they were not so well established in Canada as to warrant an exemption to the usual rule that applications had to be made from outside Canada, and that they had not demonstrated that they were wanted by Indian authorities or would be of interest owing to their failed refugee status or any other reason.

4.9 The State party submits that the decisions of the pre-removal risk assessments may be judicially reviewed by the Federal Court with leave. A judicial stay of removal pending the final disposition of that application may also be available. On 22 September 2015, the complainants applied to the Federal Court for leave to seek judicial review of the pre-removal risk assessment decision. The complainants had until 22 October to provide the Federal Court with the documentation required to advance their leave application; however, they failed to do so. As a result, their leave application did not proceed beyond filing the initial application.[22]

4.10 On 22 September 2015, the complainants also applied to the Federal Court for a judicial stay of their removal, pending the outcome of their application for leave to seek judicial review of the pre-removal risk assessment decision. In support, they filed an affidavit and written submissions setting out allegations of the risk they would face if returned to India, including reference to the alleged arrest and assault of Avtar Singh. The complainants were represented by counsel. In order to obtain such a stay, all three of the following tests must be met: there must be a serious issue to be tried by way of judicial review; there will be irreparable harm if the removal order is not stayed; and the balance of convenience favours the complainants. On 24 September 2015, a Federal Court judge declined to grant the motion as it had not been determined that there was a serious matter to be tried by way of judicial review or that the complainants would face irreparable harm if the removal order were not stayed. Therefore, the judge concluded that the balance of convenience did not favour the complainants. As a result of the negative decisions of both the Refugee Protection Division and the pre-removal risk assessment, the complainants became subject to removal from Canada on 25 September 2015 but failed to appear as required.

4.11 As to non-exhaustion of domestic remedies, the State party asserts that the authors did not diligently follow through on their application for leave and judicial review of the pre-removal risk assessment and, further, that they similarly failed to have their humanitarian and compassionate application reviewed. Finally, the authors did not make a request to a Canadian Border Services Agency enforcement officer for an administrative deferral of their removal. Judicial reviews and requests for administrative deferral of removal can provide effective relief from removal and are remedies which must be exhausted by the authors for the purposes of admissibility.

4.12 A successful judicial review would result in an order for reconciliation of the impugned decision. The State party refers to the Committee's Views in several communications which show that judicial review in the State party is not a mere formality and may, in appropriate cases, look at the substance of the case.[23] The State party addresses

[22] The Federal Court has authority to dismiss the complainants' application but had not done so by the date of the State party's submission.

[23] See Committee against Torture, *Aung v. Canada* (CAT/C/36/D/273/2005), para. 6.3; and *L.Z.B. and J.F.Z. v. Canada* (CAT/C/39/D/304/2006).

recent Views of the Committee in which it decided that judicial review in the State party does not and should not provide a review of the merits of decisions to expel individuals who face a substantial risk of torture.[24] The State party does not accept as a proposition that its domestic system of judicial review, in particular its Federal Court, fails to provide an effective remedy against removal where there are substantial grounds for believing that applicants face a serious risk. It submits that the current system does in fact provide for a judicial review on the merits when there are questions as to whether the decision maker acted within its jurisdiction; whether procedural fairness principles were complied with; whether a factual error was made; and whether the decision maker made a legal error.[25] In such cases, the Federal Court would necessarily review the applicant's claim of risk of torture if returned to his or her country of origin. If the Federal Court decides that there was an error of law or an unreasonable finding of fact, it will grant leave for judicial review and has the authority to set the decision aside and send it back for redetermination by a different decision maker, in accordance with such directions as the Court deems appropriate.[26] The Federal Court will not hesitate to intervene if it determines that the impugned decision has been erroneously made.[27] The State party further submits that its judicial review determinations, using the reasonableness standard, are consistent with the approach of the European Court of Human Rights, whereby judicial review using this standard satisfied the requirement to provide an effective remedy.[28] For these reasons, judicial review is a procedure that must be exhausted for the purposes of admissibility and the authors have failed to provide any explanation as to why they failed to exhaust this remedy.

4.13 The State party also states that the authors had the right to seek leave from the Federal Court to apply for judicial review of the humanitarian and compassionate decision. If successful, this would have resulted in an order for reconsideration of the impugned decision. Although it does not result in an automatic stay, the authors could, in tandem with the leave application, have made a motion for judicial stay of removal pending disposition of the leave application. The authors did not pursue either of the above available and effective remedies and have not provided any explanation for the failure to do so.

4.14 Another avenue available to the complainants, which they did not pursue, was administrative deferral of removal from the Canada Border Services Agency. Individuals who allege new evidence of personal risk (meaning evidence which has not previously been assessed by a domestic decision maker such as the Refugee Protection Division or a pre-removal risk assessment officer) may request a deferral from an Agency enforcement officer. Although an Agency enforcement officer has limited discretion in terms of when a removal takes place,[29] the State party's Federal Court of Appeal has held that an

[24] See *Singh v. Canada* (CAT/C/46/D/319/2007) para. 8.9.

[25] Subsection 18.1 (4) of the Federal Courts Act.

[26] Subsection 18.1 (3) of the Federal Courts Act.

[27] See Supreme Court of Canada, *Kanthasamy v. Canada (Citizenship and Immigration)*, judgment of 10 October 2015, in which the Court concluded that the humanitarian and compassionate officer had avoided the requisite analysis of whether, in the light of the humanitarian purpose of subsection 25 (1) of the Immigration and Refugee Protection Act, the evidence as a whole justified humanitarian and compassionate relief. See also Federal Court of Canada, *Tabassum v. Canada (Citizenship and Immigration)*, judgment of 19 November 2009, paras. 39 and 43, in which the Court concluded that the pre-removal risk assessment officer had mischaracterized the evidence and erred in his finding that the applicant was not being threatened by her husband; *Babai v. Canada (Minister of Citizenship and Immigration)*, judgment of 30 September 2004, paras. 35 and 37, in which the Court concluded that the pre-removal risk assessment officer had failed to consider contradictory evidence and had made a reviewable error in finding that State protection was available to the applicant; *Abbasova v. Canada (Citizenship and Immigration)*, in which the Court found that the pre-removal risk assessment officer had failed to consider new psychological evidence; *Bors v. Canada (Citizenship and Immigration)*, judgment of 12 October 2010, paras. 56–58 and 73, in which the Court determined that the pre-removal risk assessment officer's selective review of the evidence had led to an unreasonable finding that the situation of the Roma people in Hungary had improved.

[28] See *Soering v. The United Kingdom* (application No. 14038/88), judgment of 7 July 1989; and *Vilvarajah and Others v. The United Kingdom* (application Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87), judgment of 30 October 1991.

[29] Subsection 48 (2) of the Immigration and Refugee Protection Act (an enforceable removal order "must be enforced as soon as possible").

enforcement officer must defer removal where an individual establishes "a risk of death, extreme sanction or inhuman treatment" that has arisen since the last assessment of risk.[30] When considering an applicant's request, the enforcement officer does not conduct a full assessment of the alleged risks; rather, the officer considers and assesses risk-related evidence in order to decide whether a deferral of removal is warranted in order to allow for a full assessment of risk (i.e., a new pre-removal risk assessment) to be conducted. Although the complainants submit that the death of Avtar Singh is the reason that they did not present for removal and therefore consider this to be evidence of the risk they would face upon return to India, they did not present this domestically before proceeding with their communication to the Committee. If successful, this remedy would have prevented their removal, pending a full risk assessment. In the event of a negative outcome, they could have applied for judicial review along with a motion for judicial stay of removal pending the disposition of that leave application. No explanation has been provided by the complainants as to why they did not avail themselves of this remedy.

4.15 The State party submits that the provision of new evidence renders the communication inadmissible for non-exhaustion of domestic remedies. The Committee, on a number of occasions, has expressed the view that new evidence, such as documentary or medical evidence, emerging after domestic processes are concluded must first be subject to domestic review in order to give national authorities the opportunity to examine the evidence.[31] The State party further submits that it is for domestic tribunals, and not the Committee, to evaluate facts and evidence in a particular case. Therefore, the Committee should not base its views on evidence the authors failed to put before available and effective domestic processes, which would have been the proper forums.

4.16 The State party avers that the complainants have not sufficiently substantiated, for the purposes of admissibility, any of the allegations that they face a real and personal risk of torture in India such that their removal would violate article 3 of the Convention. Therefore, the communication is also inadmissible on the basis that it is manifestly unfounded, in accordance with rule 113 (b) of the Committee's rules of procedure.

4.17 The State party submits that in its general comment No. 1 (1997) on article 3, the Committee places the burden on authors to establish that they would be personally at risk. The grounds on which such a claim is based must "go beyond mere theory or suspicion" (para. 6). The allegations must be "sufficiently substantiated and reliable".[32] Important inconsistencies in the complainant's case are "pertinent to the Committee's deliberations as to whether the complainant would be in danger of being tortured upon return".[33] General comment No. 1 also includes as relevant considerations "evidence as to the credibility of the author" and "factual inconsistencies in the claim" (para. 8). In addition, the State party asserts that the Committee should give considerable weight to the findings of fact and conclusions of domestic decision makers,[34] and that it is not within the scope of review by the Committee to re-evaluate findings of fact unless it is manifest that the evaluation was arbitrary or amounted to a denial of justice.[35]

4.18 The State party submits that the complainants' allegations do not warrant any reassessment of the findings and conclusions of the domestic decision makers. Competent and impartial domestic decision makers conducted thorough assessments of the complainants' allegations of risk and found that they had not substantiated those allegations. The State party further submits that the analysis of the evidence and the conclusions drawn by domestic decision makers, in particular the Refugee Protection Division, were appropriate and well founded and that the complainants have not identified or explained

[30] See *Canada (Public Safety and Emergency Preparedness) v. Shpati*, judgment of 18 October 2011, paras. 41–45, in which the Court held that, aside from these circumstances, "other personal exigencies have been held to warrant a deferral because removal at that time would not be reasonably practicable" (para. 44).

[31] *K.K.H. v. Canada* (CAT/C/15/D/35/1995).

[32] See *Aemei v. Switzerland* (CAT/C/18/D/34/1995), para. 9.6.

[33] See *A.K. v. Australia* (CAT/C/32/D/148/1999), para. 6.2; and *N.P. v. Australia* (CAT/C/22/D/106/1998), para. 6.6.

[34] See *E.L. v. Canada* (CAT/C/48/D/370/2009), para. 8.7.

[35] See, for example, *A.K. v. Australia*, para. 6.4.

any specific examples of arbitrariness or denials of justice in the domestic decisions; indeed, those decisions do not suffer from any such defects.

4.19 The State party asserts that the complainants have not provided sufficiently reliable and contemporaneously prepared medical evidence to substantiate their allegations that they were tortured, transported by ambulance and hospitalized in 2010 and 2011 and that the first complainant required abdominal surgery, as alleged in the communication. If this were true, the complainants' stories would be supported by credible evidence in the course of their treatment. Instead, the medical evidence upon which they rely consists of one letter for each complainant, purportedly on Satnam hospital letterhead, purportedly signed by Dr. Gian Chand and dated 19 December 2012. Neither letter sets out whether Dr. Chand personally treated the authors. The letter with respect to the first complainant states that his injuries were a result of police activity; there is no information about the second complainant having informed Dr. Chand of the cause of his alleged injuries. Neither letter stipulates that the injuries sustained are consistent with torture or consistent with the complainants' claims of having been tortured. In addition, each letter specifically states that it is not for medico-legal purposes, meaning that the letters are not legal documents (i.e., not sworn statements), and thus their veracity and accuracy are unknown. Even if the content of the letters were accepted as true and accurate, the letter regarding the first complainant does not corroborate his claim to have had abdominal surgery as a result of injuries he allegedly sustained on 24 December 2012. The letter for the second complainant does not corroborate his claim to have been hospitalized from 13 to 19 July 2015 (the State party assumes this to be a typographical error, as the complainants claim that the son was in hospital in 2011). Indeed, the letter states that the son was in hospital for one day.

4.20 With regard to photographs submitted by the complainants allegedly showing injuries on their bodies caused by torture, the State party submits that none of the photographs are dated and there is no information about who took them and in what circumstances. Finally, the first complainant claims to have suffered identical injuries and to have received identical treatment on the two occasions he alleges that he was tortured, which is improbable.

4.21 In addition, the State party avers that the complainants have failed to adduce sufficiently reliable and objective evidence to substantiate their allegations regarding Avtar Singh. The dying declaration is not dated, sworn, declared or witnessed, and nothing authenticates the document, its content, the timing of its creation or its author; the alleged handwritten letter of Dr. Kholi confirming his treatment of Avtar "Johal" is not sworn, declared to be true or witnessed. Nothing authenticates its content or author or that it relates to Avtar Singh, the brother of the authors' wife/mother. The document that purports to be the death certificate of Avtar Singh and its translation are problematic in that it is a copy of a document, making it difficult to authenticate; it states that it is taken from an original death record, and nothing confirms any family connection with the complainant, the manner of death, or that his death relates to injuries sustained on 10 September 2015. Finally, the place of death is recorded as Phillaur, a town approximately 30 minutes away by car from Avtar Singh's home village of Johal. The State party submits that the evidence submitted to substantiate allegations regarding Avtar Singh is not sufficiently reliable to substantiate those allegations and should not be relied on by the Committee. The failure of the complainants to provide information regarding Avtar Singh's death to State party authorities suggests that it is not credible and thus should not be relied on by the Committee.

4.22 Based on the forgoing, the State party submits that the complainants have not established, on even a prima facie basis, that they face a rea' and personal risk of torture if returned to India. The lack of any evidence that complainants have a profile which would make them of interest to national authorities shows that the complainants would have an internal flight alternative allowing them to live without risk of serious harm in other parts of the country.[36] The authors have not submitted any evidence which would refute this proposition.

[36] Reference is made to reports regarding country conditions showing that there is no longer a general risk of ill-treatment for Sikhs in India. Only the highest-profile militants continue to face a risk.

4.23 The communication is therefore inadmissible on the above grounds. Should the Committee consider the communication to be admissible, on the basis of the forgoing facts and observations, the State party submits that the communication is without merit as the authors have not established that they face a foreseeable, real and personal risk of being subjected to torture if returned to India.

Complainants' comments on State party's observations on admissibility and the merits

5.1 On 3 July 2016, the complainants submitted their comments on the State party's observations on admissibility and the merits of the communication.

5.2 Further to their submissions of 4 October 2015 and 25 February 2016, on which they continue to rely, the complainants reiterate that legal procedures in the State party do not provide a real guarantee against violations of article 3 of the Convention. There is a substantial risk of torture for the complainants, who have clear marks of torture on their bodies, colour photographs of which are provided along with letters from doctors confirming their treatment for injuries sustained during torture. They further submit that they have provided documentary evidence regarding the risk to Sikhs in India. They assert that Sikhs remain victims of State brutality and torture in various parts of India. Further to the State party's assertion that only high-profile militants are at risk, the complainants reiterate that suspected criminals and insurgents are also at risk. The complainants state that the State party has arbitrarily rejected pertinent evidence, resulting in a denial of justice. They submit that there is no basis upon which to doubt the evidence submitted in support of their claims.

5.3 Regarding the argument that the complainants have an internal flight alternative available to them, they refer to the position of the Office of the United Nations High Commissioner for Refugees that there is no internal flight alternative when persecutors are agents of the State. The risk is everywhere. If a person moves house in India, he or she must report to the police. There is a systematic pattern of surveillance and control of persons arriving from other parts of India, particularly Punjabi speakers or Sikhs. There is no safe haven in India, and a great deal of attention will be paid to the complainants should they return there.

5.4 In response to the State party's assertion that the complainants failed to diligently pursue the judicial review of the pre-removal risk assessment before the Federal Court, in fact it was the complainants' counsel who, despite being in receipt of full payment for his services, failed to pursue the application.

5.5 The application for permanent resident status on humanitarian and compassionate grounds was denied on 10 November 2015. The complainants filed a further application for permanent residence on humanitarian and compassionate grounds on 7 December 2015, but the processing of this application can take up to four years and filing the application does not result in a stay of removal unless it is approved in principle by Canadian Immigration and Citizenship. In any case, this application is based on hardship and does not provide relief against the threat of torture.

5.6 Therefore, the complainants have exhausted all domestic remedies available to them. As to deferral of removal by the Canadian Border Services Agency, this is granted so seldom as to constitute an ineffective remedy. Regarding the deferral of removal by Canadian Immigration and Citizenship as well as judicial review of the decisions in conjunction with stay of removal from the Federal Court, the complainants confirm that, although available, these processes are very expensive, ineffective, and unlikely to bring effective relief as there is a very slim chance of success. They therefore state that they are exempt from having to pursue them in accordance with article 22 (5) (b) of the Convention.

5.7 The complainants state that they failed to adduce evidence of the torture and death of Avtar Singh before domestic authorities because they had applied for leave to seek

United Kingdom of Great Britain and Northern Ireland (Home Office) Operational Guidance Note: India (May 2013).

judicial review of the pre-removal risk assessment decision with a motion to stay the removal on 18 September 2015, through their previous counsel, to the Federal Court of Canada, which was declined on 22 September. Avtar Singh died on 24 September in India, as a result of the injuries he sustained in detention. There was therefore no legal avenue available. The complainants did inform their counsel of the matter, but he did not present the information to authorities. They present the information to the Committee in good faith. They further note that it is not the practice in India to state the cause of death on the death certificate.[37] Mr. Singh died in a town 30 minutes by car from his village because he had been arrested by police in Phillaur and admitted to the nearest hospital for treatment upon his release.

5.8 The complainants reiterate that they face a serious risk of torture and death if returned to India, and therefore to return them would violate the State party's obligations under article 3 of the Convention.

Issues and proceedings before the Committee

Consideration of admissibility

6.1 Before considering any complaint submitted in a communication, the Committee must decide whether it is admissible under article 22 of the Convention. The Committee has ascertained, as it is required to do under article 22 (5) (a) of the Convention, that the same matter has not been and is not being examined under another procedure of international investigation or settlement.

6.2 The Committee takes note of the State party's argument that the complaint is inadmissible under article 22 (5) (b) because domestic remedies have not been exhausted, as the complainants failed to pursue their application for judicial review of the negative pre-removal risk assessment, along with which a stay of removal can be requested; they failed to apply for judicial review of the denial of permanent resident status based on humanitarian and compassionate grounds; and evidence of the alleged arrest, torture and consequent death of Avtar Singh has not been brought before domestic authorities. In particular, the complainants failed to avail themselves of an available remedy in the form of an administrative deferral of removal on the basis of this new evidence, which is also subject to judicial review in the event of a negative outcome. The State party avers that judicial review in such cases assesses, inter alia, whether a factual error has been made and that such review is effective and substantive and that, in practice, cases are sent back for reconsideration on this basis. The State party further asserts that the complainants have failed to substantiate their claims that they face a personal risk of being subjected to torture if returned to India.

6.3 The Committee notes the complainants' assertion that they did not apply for any of the above relief because their counsel at the time failed to do so, despite being informed of developments. It also notes their assertion that, in any case, such remedies are expensive, ineffective and unlikely to bring effective relief, and therefore the communication should be found to be admissible in accordance with the exception under article 22 (5) (b). They claim that the evidence proffered clearly shows a personal risk and that their claim has therefore been substantiated and is admissible.

6.4 The Committee notes that even though the complainants state that the information regarding the alleged torture and death of Avtar Singh is "crucial" in establishing the risk to the life of the complainants, they failed to bring it to the attention of the domestic judicial authorities, having had the opportunity to do so both in filing documentary evidence in support of the application for leave to have the pre-removal risk assessment decision judicially reviewed and in applying for an administrative deferral of removal. It notes the fact that Mr. Singh's arrest was introduced in an affidavit attached to the judicial review leave application dated 18 September 2015, but that evidence regarding his death on 24

[37] In accordance with section 17 of the Registration of Births and Deaths Act, 1969, available at www.pbnrhm.org/docs/b&d_reg.pdf.

September 2015 was never presented. Complainants also failed at the time to cite this as a reason for their fear and consequent failure to report for removal.

6.5 The Committee recalls its jurisprudence that judicial review in the State party is not a mere formality and that the Federal Court may, in appropriate cases, look at the substance of a case.[38] Mere doubt about the effectiveness of a remedy does not, in its view, dispense with the obligation to exhaust it. The Committee concludes that the complainants have failed to advance sufficient elements which would show that judicial review of the pre-removal risk assessment and administrative deferral of removal would have been ineffective in this case and have not justified their failure to avail themselves of these options. It further notes that the complainants have not indicated that they were represented by a State-appointed lawyer at the relevant time, and recalls its jurisprudence that errors made by a privately retained lawyer cannot normally be attributed to the State party.[39]

6.6 Accordingly, the Committee is satisfied with the argument of the State party that, in this particular case, there were remedies, both available and effective, which the complainants have not exhausted. In the light of this finding, the Committee does not deem it necessary to examine the State party's assertion that the communication is inadmissible as manifestly unfounded.

7. The Committee therefore decides:

(a) That the communication is inadmissible under article 22 (5) (b) of the Convention;

(b) That the present decision shall be communicated to the complainant and to the State party.

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[38] See *Aung v. Canada*, para. 6.3.

[39] See *R.S.A.N. v. Canada* (CAT/C/37/D/284/2006), para. 6.4.